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Supreme Court, U.S.
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No. 97-1117

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

v.

DEPARTMENT OF ARMY,
UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Within the United States, Alaska is the last frontier. Like other western states, much of the early settlement and development of its territory has been facilitated by acts of Congress inviting entry onto federal lands. Making their way by foot, horse, boat, wagon or dogsled, homesteaders and prospectors were the first trailblazers across what remains rugged terrain. To encourage the tide of settlement and development of the western frontier, Congress, in a section of its mining laws of 1866, provided a self-executing grant of rights of way across unreserved public lands for the construction of highways. This statute has come to be known as Revised Statute (RS) 2477. 43 U.S.C. § 932.[1]

In Alaska and other western states, RS 2477 fostered the development of a public transportation network by securing crucial, albeit often primitive, links between various claims, homesteads, and settlements.[2] Since the RS 2477 grant was self-executing, operative upon acceptance by the proper authority or public user, use of the highways proceeded without documentation. There are hundreds of claims of historic RS 2477 rights of way in Alaska which may yet be brought before the courts for

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[1] The statute was repealed on October 21,1976, subject to valid existing rights. Federal Land Policy and Management Act, Pub. L. No. 94-579, Sections 701, 706(a), 90 Stat. 2793 (Oct. 21, 1976) and Sec. 509, 90 Stat. 2781 (codified at 43 U.S.C. 1769).

[2] Even today, many of Alaska's public roads and highways are not fit for travel by ordinary passenger cars. Yet these rustic transportation corridors are widely relied upon by Alaskans and are critical to the State's economic development and aesthetic enjoyment.

validation[3] as Alaskans are forced to defend rights of access taken for granted by property owners in the rest of the nation.

As both a landowner and representative for the public's right to access public highways, the State of Alaska has a profound interest in the interpretation of RS 2477, and in guarding against a dilution of the statute's promise. As with most western states, title to much of the land within Alaska's borders is derived from or remains in the federal government. Continued access across land now in private hands or in federal ownership is essential to continued development in Alaska. As a young state with vast territory and uncharted potential, it is crucial to the future of the state that it defend its vested rights of way under RS 2477. The decisions below misapply the law and offer little guidance to future courts. This Court should grant certiorari to illuminate the path to be followed in resolving this and future disputes by offering its interpretation of the scope of the RS 2477 grant and the requirements for acceptance.

SUMMARY OF ARGUMENT

The decision by the Ninth Circuit Court of Appeals raises questions as to the scope of Congress' offer of rights of way to those frontiersmen answering the call to "go west." Turning its back on history, the Ninth Circuit decision suggests a restriction of the grant which would

[3] No court action is required for validation if agreement can be reached with the owner of the servient estate.

burden claimants with requirements for acceptance foreign to the statute's purpose and Congress' intent, and in direct conflict with the decisions of the Alaska Supreme Court. Direction from this Court is needed not only to prevent legitimate RS 2477 routes from being foreclosed and the growth of western states stunted, but to provide a beacon for lower courts and potential litigants who would otherwise be lost trying to discern the law from the Ninth Circuit's cursory and vague decision. In the wake of the confusion wrought by the Ninth Circuit's inexplicable about-face in *Shultz v. Dep't of Army*, 96 F.3d 1222 (9th Cir. 1996), the Supreme Court should address itself, for the first time, to the scope of Congress' grant under RS 2477 and so further the orderly disposition of future RS 2477 claims.

ARGUMENT

I. The decision of the Ninth Circuit raises important questions of federal law as it narrows the scope of the grant under RS 2477 in conflict with the purpose of the act and decisions of the Alaska Supreme Court.

It is well settled that the scope of a grant of federal land is a question of federal law. *United States v. Gates of the Mountains Lakeshore Homes*, 732 F.2d 1411, 1413 (9th Cir. 1984). Moreover, unless a contrary intention is shown, it is assumed that the federal government has assented that its conveyance will be construed and given effect in accordance with the law of the state in which the land lies. *Oklahoma v. Texas*, 258 U.S. 594, 594-5 (1922); *See also United States v. Gates of the Mountains Lakeshore Homes*,

732 F.2d at 1413. The Tenth Circuit Court of Appeals provided a detailed analysis and history of the interpretation and appropriate rules of construction for RS 2477 in *Sierra Club v. Hodel*, 848 F.2d 1068, 1080-83 (10th Cir. 1988). The Tenth Circuit concluded that state law governs. *Id. See also Wilderness Society v. Morton*, 479 F.2d 842, 882 (D.C. Cir. 1973) (In dicta discussing rights of way for the construction of a haulroad supporting the Trans-Alaska pipeline, Alaska caselaw cited as authority describing the manner in which RS 2477 grant may be accepted.)

As in many other western states, Alaska law provides that the RS 2477 grant may be accepted by public user in accordance with state law or by a positive act on the part of proper authorities manifesting an intent to accept the grant. *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961); *see also Kirk v. Schultz*, 119 P.2d 266 (Idaho 1941); *Bishop v. Hawley*, 238 P. 284, 285 (Wyo. 1925). The settled expectation has been that so long as a highway has been created under the laws of the state or the territory, a valid RS 2477 route has been established. *Standage Ventures v. Arizona*, 499 F.2d 248, 250 (9th Cir. 1974); *Fisher v. Golden Valley Electric Ass'n*, 658 P.2d 127, 130 (Alaska 1983); *Ball v. Stevens*, 158 P.2d 207, 209 (Cal. 1945); *Smith v. Mitchell*, 58 P. 667, 668 (Wash. 1899). Moreover, as noted by the Tenth Circuit in *Hodel*, 848 F.2d at 1080 (10th Cir. 1988), the Department of the Interior has long interpreted the RS 2477 grant as effective "upon the construction or establishing of highways in accordance with State laws". 43 C.F.R. § 244.55 (1939); 43 C.F.R. § 2234.2-5(b) (January 1, 1965) (same); 43 C.F.R. § 2822.2-1 (January 1, 1971)

(same); 43 C.F.R. subpart 2822, *removed*, 45 F.R. 44537 (July 1, 1980).

The Ninth Circuit Court of Appeals' decision departs from the traditional interpretation of the scope of the grant under RS 2477. Ignoring the fact that burdensome requirements were not attached to RS 2477's grant of rights of way for the benefit of the settlers of the western states, the Ninth Circuit Court of Appeals appears to inject novel restrictions on Congress' grant which are unfounded in federal law, inconsistent with the clear purpose of the original grant, and inconsistent with the Alaska Supreme Court's interpretation of what was required in Alaska to accept the congressional grant. Such a change of course, which amounts to a re-writing of Congress' grant one hundred thirty years after its passage, should not pass unchecked.[4]

A. The Ninth Circuit's requirement of construction of a wagon road to constitute acceptance of the grant is unfounded and conflicts with the Alaska Supreme Court's holdings on what constitutes acceptance, thus restricting the scope of the grant under RS 2477.

The state's argument that the Ninth Circuit has improperly narrowed the scope of the grant offered under RS 2477 depends in part upon surmise, as neither

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[4] Particularly at a time when Congress has blocked the Department of the Interior from implementing new regulations interpreting RS 2477 restrictively, *see* Pub. L. 104-134, § 110, 110 Stat. 1321-177 (1996), Pub. L. 104-208, § 108, 110 Stat. 3009-200 (1996), the Supreme Court should not lend its sanction to the Ninth Circuit's wielding of a free license to narrow the scope of RS 2477's grant, even on a case by case basis.

the district court's findings nor the Ninth Circuit's terse September 20, 1996 decision agreeing with the district court offer an explicit statement of the courts' understanding of the law. Yet it appears that Mr. Shultz' claim was deemed without sufficient factual support because of Mr. Shultz' failure to prove public user of a wagon trail as the mode of acceptance of Congress' grant under RS 2477, rather than on a failure to present proof of the existence of access across what is now Fort Wainwright.[5]

The Ninth Circuit's tacit ratification of the district court's fixation on a wagon road as the measure of a completed grant under RS 2477 is not reflected in the terms of the statute or the decisions of Alaska's highest court. While certainly many RS 2477 rights of way have evolved into routes capable of supporting wagon or even automobile traffic, the law does not demand that the grant be held in abeyance until that stage of development is achieved. *Dillingham Commercial Co., Inc. v. City of Dillingham*, 705 P.2d 410, 414 (Alaska 1985); *Ball v. Stephens*, 158 P.2d 207, 210 (Cal. 1945).[6]

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[5] The district court's focus on the existence of a wagon trail is linked to an interest in how George Nissen, the original homesteader of Shultz' property, brought his crops to market in Fairbanks. Yet regardless of how the annual transport of the harvest occurred, the district court findings do admit of Nissen's overland travel between Fairbanks and his homestead. *See* District Court Findings ¶¶ 16, 35, 36, 39, 46, 47, 51, 53; *Shultz v. Dep't of Army*, 10 F.3d 649, 657-9 (9th Cir. 1993), *withdrawn*, 96 F.3d 1222 (9th Cir. 1996).

[6] Indeed, proving which of the modern, paved highways crossing the western states were more than foot trails at the time the lands crossed were reserved or otherwise made unavailable for acceptance of the RS 2477 grant would be a daunting task.

The grant provided under RS 2477 is not predicated upon the establishment of a wagon road. Instead, the grant has long been understood, as a matter of federal law, to be as broad as the state law providing for the establishment of highways. In Alaska, state law defines highways to include trails and walks. AS 19.45.001(9). Consistent with the understanding that the essential feature of a "highway" is its public character, satisfaction of the state definition does not hinge upon the capability to support any particular mode of transportation. Accordingly, the Alaska Supreme Court has acknowledged:

> Nor does the route need to be significantly developed to qualify as a "highway" for RS 2477 purposes; even a rudimentary trail can qualify. *See Dillingham*, 705 P.2d at 414; *Shultz*, 10 F.3d at 656-7.

Fitzgerald v. Puddicombe, 918 P.2d 1017, 1020 (Alaska 1996).

Neither the original district court findings nor the Ninth Circuit decision cite any authority to narrow the scope of Congress' grant of a right of way under RS 2477 to those routes capable of supporting public wagon traffic. Such a limitation is clearly not found in the law of Alaska, nor is it well adapted to the conditions faced by the western pioneers who relied upon RS 2477 to legitimize routes between points of interest. The dedication offered in RS 2477 was enacted in a period of U.S. history when Congress was encouraging westward expansion, settlement, and development. That rustic conditions would beget at first rustic trails was surely anticipated. There is no indication that Congress intended to further the hardship and sacrifice of the nation's pioneers by imposing burdensome conditions on its offer of a grant of

public rights of way. Yet *Shultz* suggests a re-writing of Congress' grant divorced from its history and purpose, and contrary to long settled expectations.

B. The Ninth Circuit's requirement of proof of the exact location of the entire route conflicts with the Alaska Supreme Court's holding that the precise location of the trail between two fixed termini can vary over time.

Precisely why the district court reached the blanket conclusion that no RS 2477 right of way was established across Fort Wainwright or on what basis a divided panel of the Ninth Circuit reversed itself to join in that conclusion defies sure detection. Yet it appears that in reaching this conclusion, the courts required a degree of identity between the historic and modern routes not demanded by Alaska law nor realistic in light of the circumstances. The Army acquired Fort Wainwright long after the homesteaders settled in the area, with an obligation to honor valid existing rights.

The district court appears to have rejected the RS 2477 claim in spite of the existence of and reliance upon a network of trail and road combinations across the unreserved lands, finding that Shultz failed to demonstrate that any one individual route was favored or precisely aligned with the modern route. However, as was correctly determined in *Shultz v. Dep't of Army*, 10 F.3d 649 (9th Cir. 1993), *withdrawn*, 96 F.3d 1222 (9th Cir. 1996), and later confirmed by the Alaska Supreme Court in *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996), the existence of an RS 2477 route across property may be established

"[a]lthough a single trail may not have predominated prior to entry." 918 P.2d at 1020. The Alaska court explained that:

> [I]t is not necessary, as the trial court appears to suggest in its findings, that the precise path of the trail be proven. It is enough for one claiming an RS 2477 right-of-way to show that there was a generally followed route across the land in question. *See Shultz*, 10 F.3d at 655.

Fitzgerald, 918 P.2d at 1021-2. The Alaska court's statement of what is required to establish a right of public passage across land properly considers the difficulties attached to travel in Alaska and the need to account for the character of the land. *Id.* at 1020. With primitive trails, seasonal variation of the precise line of travel is a practical necessity.

The decision below errs by discounting public user which manifests an intent to establish free public passage between two termini simply because of a deviation from a precise line of travel, occasioned by natural conditions or seasonal variations. The fact that there is not a perfect identity between the modern and historic routes does not defeat that original dedication of a right of passage across a property.[7] While there may be some question as to where to locate the route, that issue is distinct from the question of whether the property is burdened with a public right of way. *Compare Fitzgerald*, 918 P.2d at 1022

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[7] While there may not be a precise identity between the modern route and the early road/trail combination relied upon by George Nissen and the other early settlers, both routes essentially track the Chera River and overlap in places.

(Remand to the trial court to determine the exact location of the right of way.)

C. The Ninth Circuit suggests a quantum of usage is required that exceeds that required by the Alaska Supreme Court.

Despite the fact that George Nissen, Shultz' predecessor-in-interest, had a window of opportunity of at least three years to establish a public route between his homestead and Fairbanks before intermediate lands were taken out of the public domain, the Ninth Circuit, in affirming the district court's decision, concluded that there was not sufficient use to establish an RS 2477 route. Even if one accepts the Court's supposition that George Nissen may not have taken his harvest of crops to market overland by wagon or otherwise, the Ninth Circuit frustrates the purposes of Congress' grant under RS 2477 by its apparent sweeping discount of other evidence of Nissen's overland travel between Fairbanks and his homestead as public user sufficient to accept the RS 2477 grant under Alaska law.

Alaska law properly reflects the intent of the congressional grant as a means to encourage settlement and productive use of the lands entered. In keeping with this spirit, the Alaska Supreme Court rejected a claimed RS 2477 right of way in *Hamerly v. Denton*, 359 P.2d 121 (Alaska 1961), with the explanation that where "use [of a road] was infrequent and sporadic" by persons who "had no real interest in the lands to which it gave access," "[t]he road could not be considered as something that

was either necessary or convenient for the accommodation of the public." *Hamerly*, 359 P.2d at 125. Where, however, use of a road or trail was necessary to travel between genuine points of interest, that use can suffice to establish acceptance of RS 2477's grant.

Accordingly, just as travel by the public to mining claims beyond the parcel in question in *Fitzgerald* established that the trail was "necessary or convenient for the accommodation of the public," *Fitzgerald*, 918 P.2d at 1022 (citing *Hamerly*), a homesteader's use of a route between his homestead and the nearest settlement is public use sufficient to establish acceptance of an RS 2477 right of way. Such a route may be a highway even if it reaches only one property or is used by only one person. *Leach v. Manhart*, 77 P.2d 652, 653 (Col. 1938). The dedication offered in RS 2477 may be accepted by the public through "use by those for whom it is necessary or convenient." *Id.* The Ninth Circuit's decision suggests, without explanation or authority, that much more is required.

II. *Shultz* raises important questions of federal law, and its relationship to state law, which should be settled by this Court.

The interpretation of RS 2477 has far broader significance than its effect upon individual landowners.[8] The

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[8] Of course, novel and burdensome requirements for the validation of RS 2477 claims will have a profound effect upon individual and other private landowners seeking to secure a right of access to their lands. Substantial resources must be devoted to the increasingly uncertain cause of defending rights

course of the State of Alaska and its western neighbors will be mapped in part by decisions of courts interpreting RS 2477 and any concomitant right of access. Yet *Shultz* obscures the path towards an understanding of the extent to which Congress' grant of rights of way may be relied upon to provide the bedrock for the development of a transportation network and to fulfill the promise of relief from isolation. The clarity of the Supreme Court is needed to provide guidance to both the lower courts and litigants as numerous RS 2477 claims impacting both public and private lands are yet to be resolved.

A. The Ninth Circuit's cursory and vague opinion offers little guidance for lower courts reviewing RS 2477 claims.

Since much of the land in the western states remains in federal ownership, federal courts, including the Ninth Circuit can expect to hear many of the outstanding RS 2477 claims. Yet the decision in *Shultz*, which stands in startling contrast to the reasoned decision it supersedes, represents a step backwards in the development of the body of law guiding the resolution of RS 2477 claims. Rather than illuminate the law, the one paragraph per curium decision released by a divided panel, 96 F.3d at 1223 (9th Cir. 1996), simply invites speculation and surmise as to the legal standards governing acceptance of RS 2477's grant.

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of access. Without direction from this Court, landowners have no way to evaluate their claim and whether they have any hope of finding relief in the courts.

Though *Shultz* may resolve the particular dispute between the parties, the court's unexplained reversal of the twenty-four page decision reported at 10 F.3d at 649 (9th Cir. 1993) leaves nothing but questions for litigants to come. The 1993 decision reversed the district court on the grounds that it had misinterpreted the law as well as the facts on record. The decision, called scholarly by the *Shultz* dissent, 96 F.3d at 1223 (Alarcon, J., dissenting), bears testament to the court's critical review of both the law and the factual record upon which the district court based its findings. Yet, despite the absence of the introduction of any new authority or evidence on rehearing, the court went from having a definite and firm conviction that the district court had made a mistake, 10 F.3d at 662, to "ultimately agree[ing] with the district court that Shultz has not sustained his burden to factually establish a continuous RS 2477 route or right-of-way under Alaska common law." 96 F.3d at 1223. Whether the Ninth Circuit intended by its silence to abandon its 1993 criticisms of the district court's assessment of the law governing RS 2477 claims is indiscernible from its latest statement, as no effort is made to identify the determinative factual findings. It may be that the Ninth Circuit's about-face is complete and it has chosen to embrace as the law what it once characterized as a misunderstanding of the proper standard. By thus announcing the winner but not the rules of the game, lower courts and potential litigants can only speculate as to the requirements of the law governing RS 2477 claims.

The Supreme Court should grant certiorari so lower courts and litigants may look forward to a decision on

this matter offering illumination rather than obfuscation of the law.

B. This Court has not ruled on the requirements for acceptance of an RS 2477 right of way; its guidance is needed to prevent and simplify future litigation.

Despite the long history of RS 2477 and its broad impact upon the development of the west, the Supreme Court has not spoken directly on the requirements for acceptance of an RS 2477 right of way.[9] The time is ripe for this Court to break the silence and provide its guidance.

Conflict over the bounds of the grant and its proper interpretation divides the state and federal courts and has left the Department of the Interior at odds with Congress.[10] In the western states, both private and public land owners and managers will be impacted by the settlement of rights vested under RS 2477. As a landowner and steward of the public's right to access public highways, the State of Alaska is dedicated to preventing legitimate RS 2477 routes from being foreclosed and the future

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[9] This Court did reference RS 2477 and the general principles supporting the development of roads across the public domain in *Central Pac. Ry. Co. v. Alameda County, California*, 284 U.S. 463 (1932). However, the specific requirements for the acceptance of RS 2477's grant were not at issue as the highway in question pre-dated the enactment of RS 2477, having been established in accordance with state law in 1859.

[10] *See supra* n.4 for discussion of the dispute between Congress and the Department of the Interior.

development of the state thwarted by the adoption of new narrow and restrictive interpretations of the requirements for acceptance.

The state urges this Court to grant certiorari as only this Court can authoritatively set potential litigants, state and federal courts, as well as the other branches of the federal government, on course towards the proper interpretation of RS 2477's grant.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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